No. 14,086

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN KONG, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal Case No. 10,704.

BRIEF FOR APPELLEE.

A. WILLIAM BARLOW,
United States Attorney,
District of Hawaii,

LOUIS B. BLISSARD,
Assistant United States Attorney,
District of Hawaii,

LLOYD H. BURKE,
United States Attorney,
San Francisco, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

Miscellaneous

No. 14,086

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN KONG, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal Case No. 10,704.

BRIEF FOR APPELLEE.

I.

STATEMENT OF JURISDICTION.

The District Court had jurisdiction at the trial in this case under 18 U.S.C. § 3231; Rule 18, Federal Rules of Criminal Procedure. After conviction, a timely appeal was taken, and the jurisdiction of this Court to review the judgment of the District Court is invoked under 28 U.S.C., §§ 1291 and 1294.

II.

STATEMENT OF THE CASE.

In addition to the matters presented by appellant in his brief, the following facts are pertinent to the case. In February 1953, when the indictment herein was returned by the Grand Jury, Judge Jon Wiig had been assigned the criminal calendar and was then sitting in the case of *United States v. Charles Kazuyuki Fujimoto, et al.,* Criminal No. 10,495. Judge Wiig directed that this matter be presented to the Grand Jury and if an indictment be found that it be put on the secret file (T. 36, 37, 44, 45).

III.

ARGUMENT OF THE CASE.

SPECIFICATION OF ERROR NO. 1.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND PROPERLY DENIED APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE GROUND THAT APPELLANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL.

In England, from the very earliest time, a prisoner enjoyed the right to a speedy trial which was procured him by the commission of jail delivery, which issued to the justices of Assize, and twice every year resulted in the jails being cleared and the prisoners confined therein being convicted and punished or freed from custody. The Sixth Amendment to the Federal Constitution guarantees to an accused in a criminal prosecution under the federal law the right to a speedy

trial. However, no general principle fixes the exact time within which a trial must be had to satisfy the requirements of a speedy trial. Whether such a trial is afforded must be determined in the light of the circumstances of each particular case as a matter of judicial discretion. 22 C.J.S. Criminal Law § 466(b)(3). The Supreme Court of the United States in *Beavers v. Haubert,* 198 U.S. 77, 87, said: "The right of a speedy trial is necessarily relative. It is consistent with delay and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Associate Justice Edgerton, dissenting in *United States v. McWilliams,* App. D.C. 1947, 163 F.2d 695, after quoting from and citing *Beavers v. Haubert, supra,* said:

> "[The right to a speedy trial] is a right to be tried as soon as the interests of justice and the orderly conduct of the courts' business fairly permit."

It should be noted that the offense for which appellant was convicted occurred in November 1952. Three months later, in February 1953, appellant was indicted by the Grand Jury. Five months after that, in July 1953, the appellant made his motion to dismiss the indictment, complaining that he had not had a speedy trial, as guaranteed by the Constitution. He did not then, and he does not now, allege that he has been prejudiced by this so-called delay. On the contrary, in response to a question from the trial Court as to whether the defendant had lost the advantage of

having certain witnesses, his counsel replied: "No, if the Court please." (T. 28.) In *United States v. Holmes,* 3 Cir. 1948, 168 F.2d 888, the Court said:

> "In the complete absence of any indication that the instant defendant was adversely affected in the preparation or prosecution of his defense by the lapse of time in bringing this case to trial, we can see no ground for complaint by defendant on that score."

In that case, incidentally, the delay complained of was three years.

Be this as it may, it must be remembered that the seven and one half month so-called Smith Act trial was under way at the time the Grand Jury returned the indictment which trial was presided over by Judge Wiig and entitled *United States v. Charles Kazuyuki Fujimoto, et al.,* and that the person mentioned in this indictment, Samson Nani Peneku, was one of the jurors, he being discharged for reasons that are referred to in the indictment and which form the basis of the indictment. Under the circumstances surrounding that trial, it appears obvious that not only is this right to a speedy trial not an absolute right but it is one which must be balanced in the judgment of the Court and in the judgment of the prosecuting branch of our government with reference to the best interests of public justice and the individual constitutional rights of other defendants, particularly those then on trial in the same identical Court, especially where a case such as this grows out of the trial then in progress.

See *Delaney v. United States,* 1 Cir. 1952, 199 F.2d 107. Also see the comment of Chief Judge Swan in *United States v. Rosenberg,* 2 Cir. 1952, 200 F.2d 666, 670, in which he scores the United States Attorney for presenting and announcing an indictment which had the effect of seriously prejudicing the right of others who were at that time on trial in that jurisdiction. Such action would be, as the Court stated, grounds for a mistrial. It was to avoid just such a possibility that the indictment under consideration in the instant case was placed on the secret file and was not removed therefrom until the conclusion of the Smith Act trial above referred to. This was done, not for the personal reasons of the United States Attorney, but at the behest and on the recommendation of the judge who was then trying the Smith Act case.

SPECIFICATIONS OF ERROR NOS. 2 AND 3.

THE COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND CORRECTLY DENIED APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE GROUND OF THE INSUFFICIENCY OF THE INDICTMENT, SUCH INDICTMENT BEING SUFFICIENT IN ALL RESPECTS.

Appellant complained that in the indictment he is charged with endeavoring to influence, obstruct and impede the due administration of justice, but that he is not charged with corruptly so endeavoring. Appellant's complaint, it is submitted, is without merit. Section 1503 of Title 18, U.S.C., the section under

which this indictment is brought, makes it a crime for anyone to endeavor to influence, obstruct and impede the due administration of justice. In *Broadbent v. United States,* 10 Cir. 1945, 149 F.2d 580, the Court found that *any* endeavor to influence a witness or to impede and obstruct justice falls within the connotation of the word "corruptly", as used in the former § 241 of Tile 18, U.S.C. (now § 1503). Also in *Bosselman v. United States,* 2 Cir. 1917, 239 Fed. 82, it was found that the word "corruptly" is capable of different meanings in different connections, and as used in the aforesaid former § 241, *any endeavor* to impede and obstruct the due administration of justice in the inquiries specified is corrupt. There are several ways in which this criminal conduct can be effected. One is by doing it corruptly, another by threat or force, another by threatening letters or communications. The indictment charges the appellant with endeavoring to influence, obstruct and impede the due administration of justice, and then goes on to show how he did so endeavor. He is charged with endeavoring to influence, obstruct and impede the due administration of justice by corruptly endeavoring to influence, intimidate and impede one Samson Nani Peneku, then and there a trial juror duly empaneled and sworn in another case pending before the United States District Court for the District of Hawaii, *in violation of 18 U.S.C. §1503.*

Rule 7(c) of the Federal Rules of Criminal Procedure provides that the indictment shall be a plain, concise and definite written statement of the essential

facts constituting the offense charged. These essential facts are certainly found within the framework, within the four corners of the indictment. In *Hicks v. United States,* 4 Cir. 1949, 173 F.2d 570, the gist of the charge was that the defendant feloniously and corruptly endeavored to influence a juror. The Court sustained the sufficiency of the indictment and quoted from the opinion of Judge Rose in the case of *Martin v. United States,* 4 Cir., 299 Fed. 287, 288, in which the jurist stated:

> "The sufficiency of a criminal pleading should be determined by practical, as distinguished from purely technical considerations. Does it, under all the circumstances of the case, tell the defendant all that he needs to know for his defense, and does it so specify that with which he is charged that he will be in no danger of being a second time put in jeopardy? If so it should be held good."

At this point a footnote refers to the Federal Rules of Criminal Procedure, Rule 52(a) which states that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. This rule is a restatement of the law existing at the time of its adoption, 28 U.S.C.A., former § 391 (second sentence) and 18 U.S.C.A., former § 556. In sustaining the sufficiency of an information, this Court in *Frederick v. United States,* 9 Cir. 1947, 163 F.2d 536, 546, stated:

> "Before leaving the subject of the sufficiency of the information, we might do well to advert to the

oft-quoted but oft-ignored statutory admonition—18 U.S.C.A. § 556:

> 'No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant * * *'."

Furthermore,

> "on the hearing of any appeal * * * in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C.A. § 2111.

Indictments under the new rules are not to be construed with the technical nicety that prevailed under the old procedure. Accordingly, indictments should be reasonably construed. See *United States v. Welsh, et al.,* 15 F.R.D. 189 (D.D.C.). In *United States v. Young* (D.D.C. 1953), 14 F.R.D. 406, Judge Holtzoff, who played an important part in drafting the Rules of Criminal Procedure, after quoting from Rule 7(c) providing that the indictment shall be a plain, concise and definite statement of the essential facts, and from Rule 2 that the rules shall be construed to secure "simplicity in procedure", stated:

> "One of the purposes of the new rules was to abrogate the technicalities which all too often had led to dismissal of indictments and to reversals of

> convictions on grounds that had no connection with the guilt or innocence of the defendant. This situation had long been a reproach to the administration of criminal law. Among the many refinements impeding the decision of criminal cases on their merits were numerous technical requirements as to the contents of the indictment and the manner in which averments should be made, all inherited from a bygone era. One of the chief purposes of the new rules was to jettison this superfluous cargo, which interfered with the determination of the basic question whether the defendant committed the crime with which he was charged."

Later on Judge Holtzoff stated:

> "The present tests of the sufficiency of an indictment are that, it must apprise the defendant of the specific offense with which he is charged, and that, it must be sufficiently definite in order that if the defendant is later charged with the same or an included offense, he will be in a position to plead double jeopardy."

The Court below correctly found that the indictment clearly, plainly and simply advised the defendant of the nature of the charge in an adequate manner, enabled him to prepare his defense with regard thereto, and protected him against double jeopardy (T. 51).

Appellant cites a number of old cases decided before the adoption of the new rules. These cases, in so far as they are pertinent, are as archaic as the formal re-

quirements of the common law referred to by Judge Holtzoff.

SPECIFICATION OF ERROR NO. 4.

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY IN ACCORDANCE WITH INSTRUCTIONS NO. 3 AND 4 REQUESTED BY APPELLANT AS TO THE MEANING OF THE WORD "ENDEAVOR" AS USED IN THE STATUTE.

United States v. Russell, 255 U.S. 138, contains no authority for the appellant's proposed Instructions Nos. 3 and 4. On the contrary, "Endeavor", as the Supreme Court said at page 143

> "describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. * * * The section, however, is not directed at success in corrupting a juror, but at the 'endeavor' to do so. Experimental approaches to corruption of a juror are the 'endeavor' of the section."

In that case it was emphasized that the "endeavor", not the corruption—there of a juror—was the gist of the offense, and hence that "experimental approaches" toward offering a juror a bribe, in the shape of inquiries, made of his wife before he had been selected or sworn, concerning his attitude toward the accused, constituted the offense. See *United States v. Polakoff,* 2 Cir. 1941, 121 F. 2d 333, 334.

The instruction given to the jury as to the meaning of "endeavor" was correct, accurate and complete (T. 172-173).

SPECIFICATION OF ERROR NO. 5.

THE COURT CORRECTLY REFUSED TO INSTRUCT THE JURY IN ACCORDANCE WITH APPELLANT'S REQUESTED INSTRUCTION NO. 2.

The trial Court instructed the jury clearly and fully as to the necessary elements of the crime charged. The jury was correctly and fully instructed as to the meaning of the word "corruptly" as used in the statute, and as to its applicability in the case which it had pending before it (T. 170, 178, 180, 183-186). The Court correctly refused to give Defendant's Requested Instruction No. 2 for this proposed instruction would have the jury believe that it was necessary for the prosecution to prove that defendant's *purpose* was corrupt when he spoke to the juror Peneku.

Whether there can or cannot be a criminal intent without a motive is immaterial. What is material and here pertinent is that it was not necessary for the jury to find that appellant had any corrupt motive or purpose. With a most laudable motive or purpose one can corruptly endeavor to influence, obstruct and impede the due adminstration of justice in violation of 18 U.S.C. § 1503, and with the evidence of such endeavor being clear, as it was here, the question of motive becomes unimportant and in fact immaterial.

CONCLUSION.

It is respectfully submitted that appellant was properly convicted and that the judgment of the trial Court should be affirmed.

Dated, Honolulu, T.H.,
May 17, 1954.

Respectfully submitted,

A. WILLIAM BARLOW,
United States Attorney,
District of Hawaii,

LOUIS B. BLISSARD,
Assistant United States Attorney,
District of Hawaii,

LLOYD H. BURKE,
United States Attorney,
San Francisco, California,

Attorneys for Appellee.